

Property and Possession

Some considerations on the history of ideas relating to a pair of legal concepts

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“For a nation, its language is something special. It encompasses the entire richness of thought, its history, its religion and principles of life, its heart and soul. The language I was brought up in is my language. In the same way that a child compares all images and new concepts to what it already knows, our mind will adapt all languages to its mother-tongue.”

Johann Gottfried Herder (1744 – 1803), Fragmente zur deutschen Literatur, 183

In his preface to the German dictionary *Deutsches Wörterbuch*, Jacob Grimm calls the German legal language of his time “unhealthy and feeble, much overloaded with Roman terminology” (Dt. WBVorrede, XXXI). In contrast, he praises the graphic clarity of early German legal writing, which had already been the subject of his wonderful treatise “About Poetry in Law” (1816). It says (in the consistently lower case writing which he favoured): “german laws contain a large number of the most wonderful [legal expressions], which always capture and convey the core meaning of something with a pure image” (Kl. Schr. vol. 6, 163). Grimm was delighted in this ancient imagery and the firm roots of the law in everyday language: not only did they offer poetic enjoyment; they also contributed to a wider understanding of legal ideas. However, in Grimm’s time this enchanting union had long been considered hopelessly lost. The legal language had been thoroughly colonised by Latin. Decades had to pass and many disputes were wrought among academics before Germany was able to achieve a Germanification of the legal language at the turn of the twentieth century. From then on, German words and newly created expressions replaced the Latin terms; the dry and philologically all too distant technical language became once again richer.

I first came across Jacob Grimm in 1997 when I was working in Berlin on a dissertation about Napoleon’s art theft. When I found him, he was employed in Paris as restitution commissioner for Prussia and Hesse. I was twenty-five years old while Grimm had been thirty. As a scholar he wrestled with the French bureaucracy in order to identify rare books, manuscripts and paintings with German provenance in the wake of Napoleon’s fall. These had been shipped to Paris from all over Europe after the Revolution and during the Empire and were now to be restituted to their rightful owners. Grimm knew Paris and its institutions well; he had lived in the city a few years before, sharing an apartment with Carl Friedrich von Savigny and the latter’s wife. At the time he had conducted intense research

for Savigny in the Bibliothèque Nationale, some of it on Savigny's great theme, the "Right of Possession". Ever since, I have never lost sight of Jacob Grimm, Savigny, the appropriation and restitution issues of the period around 1800, and the related questions of cultural heritage and ownership in a transnational context. At the moment, they are on my mind more than ever as I also move between two languages and two states, between theory and practice, between the law and history, as I am concerned with investigating the question of a possible restitution of cultural assets from France to Africa. Instead of the issues arising from legal succession, good faith acquisitions, acquisitive prescription, or the statute of limitations, all of which form part of the legal debate, my focus is on the conceptual potential inherent in two German legal terms: "Eigentum" (property) and "Besitz" (possession). In the following, I would like to dedicate a few emerging thoughts to them and play with the German (legal) terminology, as a guest both in the German language and in the world of law.

A brief glance at any legal handbook will suffice to convince the layman that the two German terms "property" and "possession" naturally also exist in any other European legal language. All of them refer to Roman law, and the distinction between possession (*possessio*) and property (*proprietas*) entered almost any European codification. In French there are *possession* und *propriété*, in Italian *possessione* and *proprietà* etc. Nevertheless, it seems to me that no language has made the difference quite so beautifully graphic and serviceable for the issues that concern us as the German one.

But let us first step back for a moment, while allowing for a tiny irritation. In the daily to and fro between languages we quickly realise that there are difficulties in distinguishing between property and possession across borders, never mind the common Roman root. In everyday parlance, a German big landowner is a *Großgrundbesitzer* (from the Latin *possessio*), while his French equivalent is a grand *propriétaire* (from the Latin *proprietas*). An Englishman's cultural *property* is a German's *Kulturbesitz*; conversely, the French *propriété* intellectuelle (or the British intellectual *property*) is in German geistiges *Eigentum*. Crossing borders, it seems, confuses legal categories and even turns them into exact opposites. This is bewildering. But the bewilderment may mark the beginning of new discoveries. Firstly: the distinction is obviously an oscillation rather than a sharp division, and it invites discussion. Secondly, one cannot help feeling that in those areas of a language where legal categories of "property" and "possession" were derived from the Latin, the distinction has not seeped into collective consciousness and consequently into the respective everyday languages. Therefore, in English, French etc. the Latin *proprietas* dominates as the term both for possession and for property. And one does get the impression that the respective German terms are so vivid that differentiation seems easier. But..! At this point you will argue that even in the German-speaking world nobody is aware of or can tell the difference between property and possession. Nevertheless, I would like to stay with my impression for a moment and concur with Grimm's enthusiastic statement that in these "most beautiful legal terms [...] the meaning of the fact is captured and expressed inherently with a pure image". There is no fuzziness; the words say

what they mean. Unlike in other languages, they suggest that “having” can come in different forms and imprints.

To quote Grimm’s dictionary, “Besitz ‘m. *possessio*, formed as in sit [and other combinations based on the verb ‘sit’]” is derived from the common Germanic “sitzen”, that is, resting on one’s buttocks with an upright upper body. You can sit on (*be-sit-zen*) an animal by holding its body between the thighs, you can also “be-sit-zen” an object like a chicken sitting on its eggs, or, figuratively, a country, a realm, goods, a house or an inheritance. The physical image of sitting on something determines the understanding of the fact. A normative system and inner images, abstraction and imagination go hand in hand.

Eigentum is a similar case, even though not quite so physical. If we follow the dictionary of Middle High German (BMZ), the adjective “eigen” means “what I have, what is owned by me and not by others”. It is equivalent to the Latin *proprius* and the English *own*, and comes up in numerous combinations in modern everyday German. The suffix -tum gives a neutral and abstract quality to the term. *Eigentum*, the composite suggests, is that which corresponds to the owner, which is tied to him in the closest possible sense, as a form of his Self. The very word is an agenda.

But let’s come to the object. According to modern legal handbooks, *Besitz* as in possession refers to having “actual power over something” (BGB § 854 Abs. 1). The owner (*Besitzer*) reigns over it, he downright *sits* on it and disposes of it, regardless of whether he is the legal proprietor or not. Conversely, the proprietor has the legal power over an object and can “do as he pleases with it and exclude others from any influence” (BGB § 903). Yet it does not necessarily need to be in his possession. His ownership of that which is his own remains intact even if the object is taken away from him. “The thief who steals your bicycle has it in his possession (as *Be-sit-zer*), while you remain the proprietor” is a memorable phrase adopted in German legal training.

Applied to debates on restitution or cultural heritage, the distinction seems to me to hold significant potential. In accordance with it, museums could be considered *Besitzer* of objects which are in their power and of which they dispose without necessarily having legal proprietorship. Proprietors, in contrast, remain those who “own” the objects – in the literal sense of the word (what is most closely tied to them) – even if they may have lost the objects. My property in your museum! Whether an irony of history or a measure of philological correctness by post-war lawyers and politicians led to the name “Prussian Cultural Heritage Foundation”, in German “Stiftung Preußischer Kulturbesitz” coined in 1957, we may never know. In any case, the name is an agenda. It expresses a fact which the organisation itself would rather disguise or even deny: that in many cases (like most other European museums) it is sitting on others’ treasures. The organisation has them in its power and manages them to the best of its knowledge and belief. However, others have an understandable claim to these treasures. Museums, it could be summarily argued, are arenas for the oscillation between property and possession. They have even become (among other things) architectural and institutional temples of these legal classifications.

For quite some time, these temples tried to sidestep the property question with regard to their collections with the catchphrase of *shared heritage*. National cultural “*Be-sitz*” and the cultural heritage of humanity were implicitly considered equivalent, and the general accessibility of European museums was praised as a form of universal sharing. Such places, we read and heard, would allow even “migrants to discover their own culture in the context of other cultures”. The possibility that not only migrants (!) but entire societies in the source regions of the exhibits may have an interest in or a claim to them was either disregarded or fobbed off with references to partnerships and exhibition tours. Yet in times of closed borders and in the course of the European debate about addressing colonial injustice, *shared heritage* soon turned out to be a discursive cul-de-sac.

The property question was back as the elephant in the room. In Berlin, even in 2015 political activists had brought the issue to public attention with a sophisticated poster campaign: against a black background and in the tradition of the most refined museum aesthetic, one of these posters displayed the monumental beaded throne of Sultan Njoya from Foumban (today Cameroon), a highlight in the State Museums of Berlin. It was set next to a question in large white letters: “Preußischer Kulturbesitz?”. At the time, the museums regarded the campaign as a cheap provocation by postcolonial hippie types. In the last year or so, culture functionaries and museum officials have tried to find answers after all, by trying to argue in terms of legality or illegality of acquisitions. All over Germany, the current concern is to prove the legality of possessions piece by piece, collar for collar, relief for relief and picture for picture. “We will return stolen objects”, was a recent statement in Berlin museum circles. Yet everybody knows that the identification of “loot” is time-consuming and costly, can be ethically questionable (because for example colonial events are today still assessed in accordance with contemporary European law), and that the results are likely to be disappointing both legally and politically. In the recently published guidebook of the German Museum Association on how to handle objects in the collections from a colonial context, the instructions are unequivocal: “The current legal situation does not offer suitable instruments to answer questions arising from property claims in connection with acquisitions from a colonial context – this applies to both German law and international law.” Second cul-de-sac.

At a conference held at the Collège de France in Paris last June about “Objects’ right to self-determination?”, the ethnologist Benoît de L’Estoile made a convincing case for liberating the current restitution debate from its narrow, binary Roman-European legal corset (*droit des personnes et droit des biens*) and confront it with extra-European concepts of legality and possession. It was time, he said, to explore alternative ideas of possession and property in order to design forward-looking, innovative legal models for cultural ownership in the twenty-first century. Such an exploration is surely needed, if not long overdue. In my view, it can also be conducted within our legal traditions, seeking to identify lost options or productive constellations in the sense of a prospective historiography.

With this in mind, it seems to me that Savigny’s discussion from around 1800 about the relationship between property and possession in Roman law becomes very topical indeed. Firstly, because its subject is the law of an antique colonial

power which still influences us today and which had a vital interest in establishing and securing the legitimacy of different forms of appropriation and management – for example in order to create a legal basis for territorial appropriation of no man's land, which was (according to Roman law) not subject to any property regime. Secondly, because around 1800 museums, restitutions, art looting, cultural property and the question of legal ownership were ubiquitous issues in Europe. At the time, translocations of cultural assets were referred to as “crimes against humanity” (Heydenreich, 1798); Schiller asked in a sonnet whether the victor or the art lover was really possessed (*im Besitz*) of the muses (1803); objects from Germany that were due to be restituted were referenced as “inalienable property of the people” (1815). At the centre of the debate were not only property and possession as firm categories, but also appropriation and seizure as dynamic processes, as well as the question of a possible or impossible transition from one to the other – a very central element of the current debate. In other words: at stake was whether possession (what we sit on) can ever become property (which we own), and if so, how.

A caustic brief essay from 1840 may serve to demonstrate how the discussion once proceeded, and how floating or in need of explanation some terms still were, which could possibly prove to be a productive model for today's debate on restitution and provenance. Entitled *Was ist und gilt im römischen Rechte der Besitz? Eine Abhandlung gerichtet gegen die v. Savigny'sche Doktrin über das Recht des Besitzes*, a forgotten lawyer, Karl Pfeifer, criticised Savigny's interpretation of Roman property law (p. 65):

Savigny says: „In order to be considered a *possessor* [Besitzer], one needs to exert property rights to the object with the intention of using it as one's own property, not that of others.” The reader should consider this phrase for a moment [...] Is it really possible to use something as another's property?! Certainly, one can take possession of another's object, as a thief would do, for example; indeed anybody who treats something as his own while not being the proprietor. But I fail to imagine what exercising others' *resp.* one's own property rights in something may constitute. The will to exercise rights over others' property may conceivably apply to the will to exercise property rights to something known to be another's property, for example the will to steal, rob or defraud. But Savigny does not see it that way, because the thief is actually supposed to have the will to possess!”

In the poetic haze of this dated and knotty German legalese, we find that in between property and possession, the ancient discussion – and Savigny's teaching – also included the element of the will. This was the will to appropriate, to transfer the foreign and make it one's own. Paul Valéry referred to the phenomenon as incorporation or absorption around 1920, and for him it was closely connected to “Europe as a concept”: “For us, the ideas of culture, of intelligence, of a masterpiece have been connected – for so long that we only rarely think back to it – to the concept of Europe. Other parts of the world had admirable cultures. [...] But no part of the world had this unique physical quality: the most intense radiance combined with the strongest power of absorption.”. This power of absorption, the will to own foreign cultural property and to transfer the foreign property into one's own, to adopt

Savigny's categories, describe precisely what our museums are and why they create difficulties for us today. Against this background, it is worth being aware of past legal debates and concepts. The German language may help with this.

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